

Supreme Court of Kentucky

FROM THE 48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT, DIVISION 1
CIVIL ACTION NO. 19-CI-00425

IN RE:

COMMONWEALTH OF KENTUCKY,
EX REL. ANDY BESHEAR, ATTORNEY
GENERAL, AND JEFFERSON COUNTY
TEACHERS ASSOCIATION

PLAINTIFFS

V.

DAVID A. DICKERSON, IN HIS
OFFICIAL CAPACITY AS SECRETARY
OF THE KENTUCKY LABOR CABINET

DEFENDANT

ORDER OF DISQUALIFICATION AND APPOINTMENT

Kentucky Revised Statute (KRS) 26A.020 is Kentucky's statutory mechanism for trial-judge disqualification. Under this statute, a party who believes a judge will not afford a fair and impartial trial may file with the circuit clerk an affidavit stating the factual basis for that belief. The circuit clerk, in turn, certifies the party's affidavit to the Chief Justice for immediate review and a decision whether grounds exist to appoint a different judge for the case.

Following that statutory process, the Franklin Circuit Clerk has certified to the Chief Justice the affidavit of the Defendant, David A. Dickerson, which seeks disqualification of the Honorable Phillip Shepherd, 48th Judicial Circuit, Division 1, from presiding in the above-referenced case.

Andy Beshear, Attorney General of Kentucky, and the Jefferson County Teachers Association brought this case seeking a declaration of rights, temporary

injunction, and a permanent injunction against Dickerson, in his official capacity as Secretary of the Kentucky Labor Cabinet.

The underlying controversy arises from the teacher “sick-outs” during the 2018 and 2019 sessions of the Kentucky General Assembly and the Labor Cabinet’s issuance of subpoenas to the superintendents of several school districts for information regarding employees who called-in sick. The sick-outs and public demonstrations at the Capitol during the legislative sessions became a point of political contention between Attorney General Beshear and Governor Matt Bevin, who are opponents in the pending gubernatorial contest to be decided in November’s general election. Attorney General Beshear has used his support for—and from—teachers as a central theme in his campaign.

In Secretary Dickerson’s affidavit and the accompanying correspondence from counsel, the defense argues that Judge Shepherd should be disqualified from presiding over this case¹ because he “liked” a Facebook post supportive of Attorney General Beshear’s campaign for governor. This, the defense argues, raises an appearance of impartiality and undermines the public’s confidence in the judiciary, requiring Judge Shepherd’s disqualification from this case.²

¹ In its correspondence to Chief Justice Minton, the defense clarifies that it is only seeking disqualification in this case: “We should briefly address what our request is *not* about. It is not about Republicans or Democrats, as Judge Shepherd suggests. Nor is it about Judge Shepherd’s ability to impartially preside over any other case involving the Bevin Administration. As we mentioned at the outset, our request is narrow. It is about whether Judge Shepherd can preside over *this* case, involving a politically charged lawsuit brought by the Attorney General, after Judge Shepherd used his Facebook account to promote the Attorney General’s campaign against the Governor.” Letter to Chief Justice John D. Minton, Jr. from M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Brett R. Nolan, Michael G. Swansburg, Jr., and Katherine A. Bennett at 3, *Commonwealth of Kentucky v. David A. Dickerson*, No. 19-CI-00425 (Franklin Cir. Ct. Sep. 10, 2019) [hereinafter “Letter to Chief Justice from Pitt, et al.”].

² The defense also argued in its motion before Judge Shepherd that the judge “has taken a number of unusual steps” in this case, including “*sua sponte* order[ing] the parties to appear for a pretrial

Dickerson first filed a recusal motion before Judge Shepherd on August 27, 2019, entitled “Secretary Dickerson’s Motion to Disqualify and Transfer.” In his order denying that motion, Judge Shepherd admitted that he “liked” the post supportive of Attorney General Beshear’s campaign but that he “also ‘liked’ posts that celebrated Republicans promoting their cause (which includes the re-election of Governor Bevin)”³ Judge Shepherd further noted that his purpose in “liking” these posts was “to support the messengers, not to endorse the message” and that he “in no way intended to endorse any candidate or slate of candidates.”⁴

In opposition to disqualification of Judge Shepherd, Attorney General Beshear argues that this request must be denied by asserting that it does not meet the threshold requirement of KRS 26A.020 because the statute only provides relief “if either *party* files with the circuit clerk his affidavit that the judge will not afford *him* a fair and impartial trial”⁵ He further argues that Secretary Dickerson “fails to show—or even allege—that Judge Phillip Shepherd will not afford *him* a fair and impartial trial,”⁶ he is not entitled to relief under KRS 26A.020.

conference on August 19” and “entering a scheduling order allowing Attorney General Beshear to file a disposition motion in the lead up to the November election.” Secretary Dickerson’s Motion to Disqualify and Transfer at 3, *Commonwealth of Kentucky v. David A. Dickerson*, No. 19-CI-00425 (Franklin Cir. Ct. Aug. 27, 2019). While the defense does not focus on this argument in the filing before the Chief Justice, it is worth noting that a judge has the responsibility and authority to manage the cases on the judge’s docket. This includes the authority to schedule status conferences and enter scheduling orders in the absence of a request from an attorney. While our civil-justice system has historically relied on the adversarial relationship of the parties to move a case forward, modern best practices require judges to do as Judge Shepherd did here and take an active role by initiating action aimed at directing the movement of cases toward resolution.

³ *Commonwealth of Kentucky v. David A. Dickerson*, No. 19-CI-00425, at *1 (Franklin Cir. Ct. Sept. 4, 2019) (order denying motion to disqualify).

⁴ *Id.* at *2.

⁵ KRS 26A.020 (emphasis added).

⁶ Letter to Chief Justice Minton from J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Laura Tipton, Taylor Payne, and Marc G. Farris at 1, *Commonwealth of Kentucky v. David A. Dickerson*, No. 19-CI-00425 (Franklin Cir. Ct. Sep. 12, 2019).

In response, Secretary Dickerson argues that Governor Bevin is effectively a party to the lawsuit because “the Attorney General brought this lawsuit against Governor Bevin’s administration, and the Attorney General frequently promotes the lawsuit as part of his campaign for governor.”⁷ Secretary Dickerson expands on this point by noting that when this lawsuit was filed, Attorney General Beshear wrote on his campaign Twitter account that, “Matt Bevin threatened Kentucky teachers with subpoenas and \$1,000 fines, so Andy is taking him to court to protect them.”⁸

The language of KRS 26A.020 does limit the filing of an affidavit for disqualification to a party to the action. But Secretary Dickerson makes a compelling argument that Governor Bevin is, for all intents and purposes, a party to this action. The lawsuit is against one of Governor Bevin’s cabinet secretaries, and the Attorney General publicly announced after filing the lawsuit that he was taking the governor to court. Accordingly, the matter of the judge’s disqualification is properly before the Chief Justice.

Under KRS 26A.020,⁹ a party may file with the circuit clerk an affidavit “that the judge will not afford him a fair and impartial trial.” This affidavit prompts the Chief Justice “to review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge.” About the authority

⁷ Letter to Chief Justice from Pitt, et al., *supra* note 1, at 2. *See also* Secretary Dickerson’s Motion to Disqualify and Transfer, *supra* note 2, at 4 (“Make no mistake, even though Labor Cabinet Secretary Dickerson is the named defendant, this is a suit between two political opponents.”).

⁸ *See* Secretary Dickerson’s Motion to Disqualify and Transfer, *supra* note 2, Ex. 2.

⁹ It should be noted that this Court has held KRS 26A.020 to be an unconstitutional “encroachment by the legislature on the power of the judiciary to make rules.” But because it is a “‘statutorily acceptable’ substitute for current judicially mandated procedure” and “out of deference and respect,” the Court has extended comity to the legislature. *Foster v. Overstreet*, 905 S.W.3d 504, 506–07 (Ky. 1995).

given to the Chief Justice when making such a determination, KRS 26A.020 is vague, and there is a paucity of caselaw to illustrate or develop the Chief Justice's authority.

KRS 26A.015 offers guidance regarding when disqualification is appropriate. That statute provides, among other things, that a judge should disqualify himself "[w]here he has knowledge of any other circumstances in which his impartiality might reasonably be questioned." Similarly, Rule 2.11 of the Code of Judicial Conduct provides that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."¹⁰

Having established the standard for disqualification, the question then turns to whether "liking" a Facebook post supportive of Andy Beshear's campaign for governor created a circumstance in which Judge Shepherd's impartiality might reasonably be questioned.

In January 2010, the Kentucky Judicial Ethics Commission issued its only formal opinion on judges' use of social media.¹¹ In response to a question about whether a judge may participate in a social-networking site, the Commission gave a "qualified yes."¹² But the Commission cautioned that "social networking sites are fraught with peril for judges" and that its opinion "should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public."¹³ The Commission further noted that while judges are permitted to participate in social-networking sites, they should be

¹⁰ Supreme Court Rule (SCR) 4.300.

¹¹ Ethics Comm. of the Ky. Judiciary, Judicial Ethics Opinion JE-119, Judges' Membership on Internet-Based Social Networking Sites (Jan. 20, 2010).

¹² *Id.* at 1.

¹³ *Id.* at 4.

“extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.”¹⁴

The body of law addressing judges’ use of social media is still developing nationally. But recent opinions emphasize that “[t]he code of judicial conduct’s restrictions on judges’ off-bench activities apply equally on social media as in other contexts.”¹⁵ This includes the restriction under Rule 4.1(A)(3) of the Code of Judicial Conduct prohibiting a judge or judicial candidate from “publicly endors[ing] or oppos[ing] a candidate for any public office.”¹⁶

Kentucky’s Judicial Conduct Commission (JCC) has recognized in two separate private reprimands that “liking” a post on Facebook may run afoul of Rule 4.1(A)(3). In the first instance, the JCC issued a private reprimand to a judge for “liking” the Facebook page of a candidate for judicial office.¹⁷ The JCC opined that “liking” the Facebook page of the judicial candidate violated the rule prohibiting a judge from publicly endorsing a candidate for public office.¹⁸ The JCC further noted that “all judges must be sensitive that when they participate on social media, they violate the Code of Judicial Conduct if their actions are inappropriate for judges.”¹⁹

¹⁴ *Id.* at 5 (emphasis in original).

¹⁵ Cynthia Gray, Social Media and Judicial Ethics: Part 2, 39 *Jud. Conduct Rep.* 1, 2 (Summer 2017).

¹⁶ SCR 4.300.

¹⁷ Order of Private Reprimand, Commonwealth of Kentucky Judicial Conduct Commission (Dec. 5, 2014), *available at* https://kycourts.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand120514.pdf.

¹⁸ *Id.* at 1. The Code of Judicial Conduct was revised in January 2018. The Private Reprimand references “Canon 5A(1)(c) as the prohibition against publicly endorsing a candidate for judicial office.” This rule is the predecessor to the current Rule 4.1(A)(3), which includes the same prohibition.

¹⁹ *Id.*

A few months later, the JCC issued another private reprimand to a judge for “liking” the Facebook pages of candidates for elected office, even though those “likes” were made before taking judicial office.²⁰ In issuing this private reprimand, the JCC again exhorted judges to “be sensitive when utilizing social media so as to not violate the Code of Judicial Conduct.”²¹

In the present case, there is no question that Judge Shepherd “liked” the Facebook post supporting Andy Beshear’s campaign for governor. This was, as illustrated by the JCC’s previous reprimands, a per se violation of Rule 4.1(A)(3). The fact that Judge Shepherd also “liked” posts supportive of Governor Bevin’s campaign or of other Democratic and Republican candidates does not, as the Secretary Dickerson notes, right the wrong. In fact, those “likes” constitute additional violations of Rule 4.1(A)(3).

It is important to recognize that Secretary Dickerson does not allege, and there is nothing in the record to indicate, that Judge Shepherd has explicitly endorsed Andy Beshear’s campaign for governor. And, notably, there is no allegation that Judge Shepherd is biased against Governor Bevin or Secretary Dickerson. To the contrary, the Chief Justice is convinced that Judge Shepherd would preside over this case, as he has in so many other cases, in a completely fair, neutral, and unbiased manner.

²⁰ Order of Private Reprimand, Commonwealth of Kentucky Judicial Conduct Commission (Apr. 2, 2015), *available at* https://kycourts.gov/commissionscommittees/JCC/Documents/Public_Information/PrivateReprimand100915.pdf.

²¹ *Id.*

But the standard for disqualification under KRS 26A.015 and Rule 2.11 does not require actual proof of bias. Rather, the standard simply requires disqualification in circumstances where the judge's impartiality might reasonably be questioned. Given that Judge Shepherd's "like" may reasonably be perceived as a public endorsement of a candidate's campaign, that the candidate is a party in this case, and that this case involves a central issue in that candidate's campaign, this is one such circumstance. Accordingly, Judge Shepherd must be disqualified from further presiding over this case.

Finally, this case should serve as a cautionary tale to all Kentucky judges who use social media. As the Judicial Ethics Commission wisely admonished in its 2010 opinion, these services are "fraught with peril" for judges and should be used with extreme caution. While judges are not ethically prohibited from using social media, their use is subject to the Code of Judicial Conduct in the same manner as other extrajudicial activities. Judges should review their social-media presence to ensure it does not violate the Code of Judicial Conduct and should act prudently when "liking" pages, posts, or tweets or otherwise interacting with other users on social media.

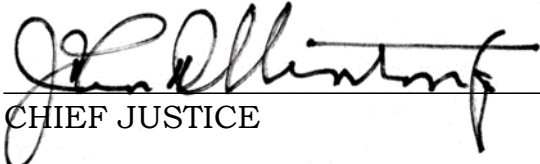
For these reasons, the Chief Justice orders as follows:

(1) The request to disqualify the Honorable Phillip Shepherd from presiding over the above-referenced case is GRANTED without prejudice to any party to seek appellate review after entry of a final judgment; and

(2) The case will be transferred to Judge Thomas D. Wingate, Franklin Circuit Court, Division 2, for all further proceedings; and

(3) The Franklin Circuit Clerk shall place a copy of this order in the record of the above-styled matter and serve copies of this order on all counsel of record and parties not represented by counsel; and

Entered this 27th day of September 2019.


CHIEF JUSTICE

Copies to: Amy Feldman, Franklin County Circuit Court Clerk
Phillip Shepherd, Chief Circuit Judge, 48th Judicial Circuit, Division 1
Thomas D. Wingate, Circuit Judge, 48th Judicial Circuit, Division 2
M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, and Brett R. Nolan, Office of the Governor
Michael G. Swansburg, Jr. and Katherine A. Bennett, Office of the General Counsel, Kentucky Labor Cabinet
J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Laura Tipton, Taylor Payne, and Marc G. Farris, Office of the Attorney General
Thomas J. Schulz and Don C. Meade, Priddy, Cutler, Naake & Meade, PLLC